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Supreme Court of the United States

OCTOBER TERM, 1956

NO. 514

UNITED STATES OF AMERICA, ex rel. ALFRED J. ACKERMAN, Petitioner

v.

FRANK C. JOHNSTON, Warden, Western State Penitentiary, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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Supreme Court of the United States

OCTOBER TERM, 1956

NO. .....

UNITED STATES OF AMERICA, ex rel. ALFRED J. ACKERMAN, Petitioner

v.

FRANK C. JOHNSTON, Warden, Western State Penitentiary, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

ALFRED J. ACKERMAN, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit, made and entered August 7, 1956, affirming the decision of the District Court for the Western District of Pennsylvania, discharging his Petition for a Writ of Habeas Corpus.

OPINIONS BELOW

The Opinion of the District Court for the Western District of Pennsylvania is reported in 139 F. Supp. 890 and appears in the record as printed for the Court below (App. Vol. V, 1457a-1466a). A second opinion of the

District Court, reported in 133 F. Supp. 627, is printed in the appendix to this Petition.

The opinion of the Court of Appeals, filed August 7, 1956, is reported in .... F.2d .... and a copy is annexed to this Petition as part of the Appendix.

JURISDICTION

(i) The order sought to be reviewed was dated and entered August 7, 1956.

(ii) A Petition for Rehearing was denied by the Court of Appeals on September 13, 1956. No order has been sought or granted to extend the time within which to petition for Certiorari.

(iii) The statutory provisions believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari are 28 U.S.C.A., sections 1254 and 2254.

QUESTIONS PRESENTED FOR REVIEW

(I) Did the consolidated trial in the State Court of petitioner and his codefendant on 106 separate indictments deprive him of due process of law contrary to the Fourteenth Amendment?

(II) Where a petitioner for a writ of habeas corpus admittedly has exhausted his state remedies on the principal due process question, may the District Court properly take into consideration subsidiary due process questions on which it finds petitioner has not fully exhausted his state remedies?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, Section 1: ". . . nor shall any state deprive any person of . . . liberty . . . without due process of law."

STATEMENT OF THE CASE

Petitioner, Alfred J. Ackerman, a Justice of the Peace, was indicted in the Court of Quarter Sessions of Allegheny County, Pennsylvania, on numerous charges of Extortion, False Pretense, Misdemeanor in Office, Violation of the Motor Code, and, with a co-defendant, a Deputy Constable, for Conspiracy to Cheat and Defraud. All of the cases arose out of the petitioner's conduct of the office of Justice of the Peace, which office he had held for approximately 20 years. An investigation made by the District Attorney's office for the period of January 1951 to August 1952, resulted in criminal prosecutions based upon the handling of 37 different cases, out of the approximately 6600 disposed of by the Squire during that period.

The charges for the most part arose out of the collection of the costs in criminal cases over an 18 month period. The Commonwealth contended that the defendants had collected costs from the County in cases where they had collected previously from the parties, had charged fees that they were not entitled to, had collected larger fees than the law allowed, etc. In one case, Squire Ackerman was charged with Violation of the Motor Code in that he had failed to keep a record of a certain case, and in another Motor Vehicle case, had

failed to turn over to the Commonwealth of Pennsylvania two fines of $10.00 each. The total costs allegedly collected illegally amounted to a few hundred dollars.

On May 29, 1953, following a nine day trial of eighty indictments against your Petitioner and twenty-six against his co-defendant, one Bolden, the jury returned a verdict of guilty on all charges, as to Bolden, and of fifty-seven, as to Ackerman. On nine cases of False Pretense and the companion cases of Misdemeanor in Office, Ackerman was found not guilty (App. Vol. IV, 1399a). In four cases demurrers were sustained, and in one case the jury failed to return a verdict. The Commonwealth agreed to *nolle pros.* this case rather than send the jury out for further deliberation. (App. Vol. IV, 1400a, 1401a).

Post-trial motions having been refused, Ackerman was sentenced on nine cases, and sentence was supended on the remaining 48 cases. The total period of imprisonment imposed was two years. Appeals were taken to the Superior Court of Pennsylvania on the nine cases where appeal was permitted under Pennsylvania law. The convictions were sustained in eight of the cases and reversed in one case on non-federal grounds.

The Supreme Court of Pennsylvania refused allocatur, without opinion, on October 13, 1954. This Court refused certiorari: 348 U.S. 951.

On March 4, 1955, Petitioner was removed from the St. Francis Hospital, Pittsburgh, Pennsylvania, where he was then a patient, and committed to the Allegheny County Jail. Thereafter his physical condition de-

generated to such an extent that the Warden and Jail Physician joined in a petition requesting a transfer to a private hospital. After hearing, the Court of Quarter Sessions of Allegheny County ordered Petitioner's transfer to the hospital at the Western State Penitentiary.

On August 4, 1955, a Petition for Writ of Habeas Corpus was filed in the District Court for the Western District of Pennsylvania. Relief was sought on the ground that Petitioner had been deprived of due process of law in connection with his trial in the state court. Petitioner also requested that he be released on bail pending disposition of the proceedings, by reason of his physical condition.

Hearing was held in the District Court on the Rule to Show Cause why the writ should not issue. Records of proceedings in the State Courts were filed and extensive testimony taken in support of Petitioner's claim for release on bail. Additional exhibits and testimony were offered in support of Petitioner's claim that he had been deprived of due process of law by pervasive, prejudicial, pre-trial publicity, but this evidence was rejected. At the close of the hearing, the District Court granted the request for release on bail and reserved decision on the merits.

Immediate application was made by the District Attorney to the Court of Appeals for Writs of Prohibition and Mandamus, directed to District Court Judge Rabe F. Marsh, the purpose of this proceeding being to raise the question of whether a federal court has the power to release a state prisoner on bail pending disposition of a petition for writ of habeas corpus. The

Court of Appeals, on November 30, 1955, sustained the action of the District Court: 227 F 2d 528.

On December 2, 1955, Judge Marsh filed his opinion refusing the writ: 139 F. Supp. 890. Bail was continued pending appeal, pursuant to Supreme Court Rule 49, and a Certificate of Probable Cause issued. The Court of Appeals sustained, in a decision filed August 7, 1956, and not yet reported.

Following denial of a Petition for Rehearing, return of the mandate was stayed pending application to this Court.

BASIS FOR FEDERAL JURISDICTION

The Petition for Writ of Habeas Corpus raised three questions under the due process clause of the Fourteenth Amendment, i.e., (1) the consolidated trial of 106 separate indictments against two defendants; (2) pervasive pre-trial publicity, in part instigated by the prosecutor; (3) the general manner in which Petitioner's trial was conducted in the state court. Petitioner further averred that he had exhausted his state remedies by direct appeal from his conviction to the Pennsylvania Superior Court and application for Allowance of Appeal to the Pennsylvania Supreme Court, followed by unsuccessful application to this Court for Writ of Certiorari.

The District Court held that Petitioner had exhausted his state remedies on the consolidation issue, but had failed to do so in reference to the publicity question, it appearing that this issue was not raised formally in the appeal to the Superior Court and not specifically mentioned in the Petition for Allowance of Appeal to the Pennsylvania Supreme Court. The District Court did not discuss the question of exhaustion of state remedies in connection with the third point relied upon by Petitioner, holding that the specific procedural objections set forth under this heading were insufficient to raise a federal constitutional issue.

The Court of Appeals affirmed Per Curiam, discussing only the question of exhaustion of remedies as applied to the publicity question. As to the other two points, the appellate court stated only that it had given them "careful consideration".

ARGUMENT

I. The Consolidated Trial in the State Court of Petitioner and His Co-Defendant on 106 Separate Indictments Deprived Him of Due Process of Law Contrary to the Fourteenth Amendment to the United States Constitution. This Question Has Not Previously Been Decided by This Court.

Originally in the state courts, on direct appeal, and then in the lower federal courts Petitioner has contended that the basic issue involved in this case is the constitutionality of the trial before the same jury of 106 separate indictments, 80 of them against this Petitioner and 26 against his co-defendant. These indictments arose out of 37 separate and distinct fact situations, and involved offenses committed on different dates extending over an 18 month period. 30 of the indictments against this Petitioner charge the commission of felonies.

The Pennsylvania Superior Court, passing upon the propriety of the consolidated trial held that the extent to which cases may be consolidated is a matter for the sound discretion of the trial court, reversible error only if there is a "clear showing of an abuse of discretion" (App. Vol. IV, 1440a-1442a). It found no such abuse, though the lower court had held that the connection between the several offenses which justified their joint trial was that, taken together, the offenses indicated on the part of the defendant "a frame of mind which was wilful and corrupt" (App. Vol. IV, 1409a).

This approach to the problem of consolidation represents, we submit, a serious encroachment upon the

rights of defendants, which should be checked in the interest of preventing great injustice, not only to this Petitioner, but to defendants in subsequent cases.

The federal district court, rejecting the narrow view of the rights of the defendant implicit in the Superior Court's opinion, held that consolidation may be "so prejudicial as to destroy the presumption of innocence . . . and to render the trial fundamentally unfair and therefore void as being without due process . . ." (App. Vol. V, 1462a). The holding that consolidation did not have this effect in the instant case was reached by the District Court Judge despite the fact that he did "entertain misgivings" as to one aspect of the consolidation and based his finding of its propriety in this respect upon the reasons set forth in the Superior Court opinion, "notwithstanding my apprehension on this score" (App. Vol. V. 1463a).

Certainly this language, and the granting of the Certificate of Probable Cause, indicated that the trial judge felt that Petitioner had asserted a bona fide claim of constitutional right, which he had refused to sustain only with considerable hesitation.

The affirmance of the district court's holding thus resulted in the decision by the Court of Appeals of an important question of federal law, which has not been settled by this Court, but should be. We believe the District Court to have been right in declaring that excessive consolidation may be a denial of due process, and the Court of Appeals correct in affirming this holding, but we submit that both courts erred in their application of the principle to the facts of this case.

There is no reason to believe that until standards in respect to consolidation are laid down by this Court that there will be any abatement of the alarming trend, apparent in recent years, toward the creating of a presumption of guilt by the joint trial of a multiplicity of cases. We respectfully suggest that defendants' rights in this respect should be delineated before the situation becomes intolerable.

Counsel has no way of knowing to what extent courts in other states have permitted numerous charges to be presented to the same jury, but certainly in every large municipal area the interest of the courts in expediting their business must have encouraged this trend. A review of the development of the situation in Pennsylvania may shed some light on the problem.

Consolidation of the trial of felony charges, as distinguished from misdemeanors, is a comparatively recent development in Pennsylvania. Under the common law, the trial of more than one felony indictment before the same jury was unknown. Sanctioning the joint trial of several misdemeanor charges, Mr. Justice Gibson, in *Withers v. Commonwealth,* 5 S. & R. (Pa.) 59, (1819) said:

> "As to felonies, a different rule prevails, and the court goes so far as to quash where distinct offenses are charged, or, if no motion for that purpose be made in time, to compel the prosecutor to select a particular offense, to which alone the prisoner is held to answer."

This general rule has not been modified by statute in Pennsylvania, except in several isolated cases which

serve only to emphasize the rule. Thus, both wilful and involuntary manslaughter may be charged in the same indictment, counts of Larceny and Receiving Stolen Goods may be joined, and distinct acts of embezzlement, not exceeding three, committed by a servant against the same master, may be combined if the offenses were committed within a six months' period.

Commencing with the 1940s, the Pennsylvania Superior Court in a series of cases permitted the consolidation of felony charges on a broad basis, despite the rule of the common law and the apparent legislative policy. In none of these cases was the constitutional question raised or considered by the Superior Court, nor were decisions reviewed by the Pennsylvania Supreme Court. Not until the instant case reached the Superior Court on direct appeal was the basic constitutional issue in reference to consolidation squarely presented for decision. The opinion of the Superior Court (App. Vol. V, 1438a-1448a) affords little hope that Pennsylvania will, without direction from this Court, recognize the claim of constitutional right asserted in this case.

We are well aware that this Court cannot be expected to review on certiorari every situation in which the Petitioner contends the state courts have refused to recognize a right protected by the Fourteenth Amendment. But more than that is here involved. We have raised a new question under the due process clause. It is a fundamental issue because it involves the question of whether state court procedures may be used to destroy the presumption of innocence — a presumption recognized by this Court to be basic in American law:

Manley v. State of Georgia, 279 U.S. 1 (1929); *Morissette v. U.S.,* 342 U.S. 246 (1951). The lower courts herein have conceded the merit of our claim of constitutional right, though refusing to concede its applicability to the facts of this case. The potentialities of serious abuse are great, if this right is not recognized and defined by this Court. All of these factors indicate the necessity for review by this Court.

Cited for comparison by the District Court, in connection with its reliance, in part, upon the Superior Court opinion, is the case of *U.S. v. Ashe,* 270 U.S. 424 (1926). This was a habeas corpus action brought by one Valotta following affirmance by the Pennsylvania Supreme Court of his conviction for murder. Judge Thomson of the federal district court for the western district of Pennsylvania had issued the writ, basing his decision upon the denial to the defendant of due process arising from the joint trial of two murder indictments: *Commonwealth ex rel. Valotta v. Ashe,* 2 F.2d 735 (1924). Reviewing Pennsylvania law, Judge Thomson emphatically rejected the contention that either the common law or Pennsylvania statutory law permitted consolidated trials in felony cases. This Court reversed the decision, holding that the question of what was due process under Pennsylvania law was for the state courts.

We do not consider the *Valotta* case controlling in the instant case. On its facts, the joint trial of two murder indictments was appropriate, where the homicides were committed at the same time and place and with the same weapon. Here the alleged crimes were separate and distinct, occurred over an 18 months period and were proved by different witnesses for each of the

separate fact situations. Five categories of crimes were charged, some of them misdemeanors, some felonies.

Moreover, since the *Valotta* decision this Court has intervened in state court cases to protect fundamental rights of defendants, in cases too numerous to cite. Recognizing that no particular form of procedure in state criminal cases is guaranteed by the United States Constitution, this Court has nonetheless insisted that the procedures afforded must protect the substantial rights of the accused: *Twining v. New Jersey,* 211 U.S. 78 (1908); *Tumey v. Ohio,* 273 U.S. 510 (1927).

In addition to the general reasons for review outlined above there is one additional factor personal to this Petitioner. As we have indicated, the District Court took extensive testimony in support of Petitioner's claim for release on bond pending disposition of the proceedings. In an opinion reported in 133 F.Supp. 627, and printed in the Appendix to this Petition, the Court found as a fact that Petitioner, aged 62, was suffering from advanced diabetes, diabetic ulcers on his feet and ankles and other lesser ailments. He further found that while incarcerated Ackerman had become practically blind in his left eye and would probably become totally blind if he remained confined in the Penitentiary, whereas, if released on bond, there was a "fair probability" that he would retain the residual vision in his right eye. In view of the serious question in this case as to whether Petitioner's rights had not been violated in the state court trial, release on bond was permitted.

Although Supreme Court Rule 49 expressly sanctions release pending review, we know of no other case in which a state prisoner has been granted such relief,

despite the denial by the district court of the writ of habeas corpus. This fact alone suggests that Petitioner's claim is substantial, and the question of whether he should be granted relief a close one.

If this Court determines either that state courts may consolidate without limitation, regardless of the effect of this procedure upon the presumption of innocence, or that the limitations properly imposed by the requirements of due process were not exceeded in this case, then, of course, this Petitioner must return to the Penitentiary and the extra-judicial punishment of blindness which awaits him there. To require such return without a final determination by this Court, where an important question of federal law not yet settled by this Court is present in his case, would work great hardship. We respectfully request that, in determining whether review will be allowed, consideration be given to these extraordinary circumstances.

II. Where a Petitioner for a Writ of Habeas Corpus Admittedly Has Exhausted His State Remedies on the Principal Due Process Question Involved in the Case, the District Court May Properly Take Into Consideration Subsidiary Due Process Questions on Which It Finds Petitioner Has Not Fully Exhausted His State Remedies. This Question Has Not Previously Been Determined by This Court.

The District Court herein found that Petitioner had not exhausted state remedies in respect to the publicity question raised in the Petition, since the question had been raised informally in the Pennsylvania Superior Court and was not included in the Petition for Allowance of Appeal filed in the Pennsylvania Supreme Court. The Court of Appeals discussed and affirmed this holding, without adverting to the effect to be given it in terms of the fact that Petitioner admittedly had exhausted his state remedies on the principal issue of the case.

The District Court also refused to give any consideration to the general manner in which the state court proceedings were conducted, holding that the specific objections raised under this heading did not raise federal constitutional questions.

It is our position herein that the exhaustion of remedies rule does not require that all state remedies on every conceivable constitutional issue be exhausted before resort to the federal courts, but only prohibits the granting of relief on any ground which has not previously been considered by the state courts. Cf., *Vanderwyde v. Denno,* 113 F.Supp. 918 (D.C.N.Y. 1953), cert. denied, 347 U.S. 949, rehearing denied, 347 U.S. 971.

If, however, the District Court finds that in respect to the major ground on which Petitioner relies, state remedies have been exhausted, then, we submit, the court has the duty of considering what this Court has referred to as the "totality of facts" in the case: *Betts v. Brady,* 316 U.S. 455 (1942). This must necessarily include the whole course of procedure in the state court, regardless of whether Petitioner is barred from relief on the details objected to, either by the exhaustion of remedies rule or their insufficiency as independent constitutional issues.

We find no case in this Court determinative of this question. Normal procedure in lower federal courts has been to consider only those issues on which state remedies have been exhausted (*Vanderwyde v. Denno,* cited supra; *Cranor v. Cooper,* 203 F.2d 833 (9th Cir. 1953). Such procedure was followed herein, the District Court considering only the consolidation issue.

If review is granted in this case we would like to argue alternatively either that Petitioner has exhausted his remedies on the two subsidiary points or that his failure to do so does not bar this Court from considering these points, not as evidence of independent violations of Petitioner's rights, but rather as part of the "totality of facts" of this case. We do not contend that the matters raised under this heading, by themselves entitle us to review in this Court.

Conclusion

We have not sought herein to review in detail the decisions on which we base our contention that the submission of 106 indictments to the same jury inevitably destroyed the presumption of innocence and thus deprived Petitioner of due process of law. Rather we have suggested that the time is ripe for this Court to establish appropriate standards in respect to a new claim of constitutional right. For these reasons, Petitioner respectfully prays that this Court issue a writ of certiorari to the Court of Appeals for the Third Circuit, to review its order sustaining the decision of the District Court for the Western District of Pennsylvania, refusing the writ of habeas corpus.

Respectfully submitted,

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APPENDIX

Opinion of the District Court Sur Release on Bond.

MARSH, District Judge.

The relator, a state convict, in his petition for a writ of habeas corpus asks that he be admitted to bail pending disposition of the proceeding. At the hearing on the rule to show cause, the relator was permitted to produce evidence in support of his application for bail. From that evidence we make the following

FINDINGS OF FACT

1. The relator, Alfred J. Ackerman, is a citizen of the United States and a resident of the County of Allegheny in the Western District of Pennsylvania, where he has resided for 62 years.

2. The prisoner is being detained in the custody of the Warden in the hospital at the Western State Penitentiary in this District by virtue of an order of the Court of Quarter Sessions of the Peace of Allegheny County under the authority of the Act of 1919 P.L. 356, par.[1] 1, transferring him to said hospital from the Allegheny County Jail, where he had been committed on March 4, 1955, pursuant to judgment rendered in the said Court of Quarter Sessions on January 8, 1954, at Nos. 162 May Sessions, 1953, 293 March Sessions, 1953 and 165, 130, 122, 41, 53, 62 and 105 May Sessions, 1953.

3. The relator is suffering from advanced diabetes which has seriously affected his vision and caused or

[1] Purdon's Pa. Stat. Ann. tit. 61, par. 81 (1930).

contributed to ulcerated feet and ankles; a righ inguinal hernia, sclerosis, hemorrhoids, poor circulation, gastro intestinal disorders, bladder trouble and neuritis. Relator's heart is normal for a man of his age.

4. The relator is now practically blind in his left eye, his vision therein being since the beginning of his incarceration 2/200; at the beginning of his incarceration his right eye was 8/200, is now 4/200 and is progressively deteriorating.

5. During the trial, pending the appeal and during his incarceration, the relator has been and is now emotionally upset; he was described by a psychiatrist as a "character disorder, passive aggressive. He is legalistic in his thinking and is trying desperately to manipulate his environment. He accepts no limits."

6. The relator will probably become totally blind if he remains confined in the Penitentiary hospital and his mental condition continues. On the basis of the testimony of Dr. Irving J. Morgan, I find as a fact that if he is released on bail pending ultimate decision in this habeas corpus case, he has a fair probability of retaining the residual sight in his right eye during his freedom on bail. Dr. Morgan testified to the effect that due to the relator's emotional upset, his liver pours excessive sugar into his blood which in turn is responsible for the rapid progress of the diabetes and the rapid deterioration of his vision.

DISCUSSION

It is contended vigorously by the Commonwealth that this court cannot admit a state convict to bail pending disposition of a habeas corpus proceeding. The relator just as vigorously contends that the court has the inherent power to grant bail in habeas corpus proceedings regardless of whether the relator is a state convict, and that in this case it should be exercised because of the extraordinary circumstances.

The matter resolves itself into two questions: the first is one of jurisdiction, the second is one of power.

The question of jurisdiction is easily settled. This court may issue a writ of habeas corpus to any state prisoner if "[h]e is in custody in violation of the Constitution . . . .of the United States." 28 U.S.C. par. 2241(c)(3) (1952). That this encompasses prisoners held by the states has been well settled since Ex parte Royall, 117 U. S. 241 (1886). This has been reasserted by the Court of Appeals for the Third Circuit in United States v. Hendricks, 213 F. 2d 922, 924ff. (3d Cir. 1954), cert. denied 348 U. S. 851 (1954), in which the attorneys general of forty states participated in opposing jurisdiction.

The petition before me sets forth sufficient facts on its face to establish, if subsequently found to be true, that the relator was deprived of "due process of law" under U. S. Const. Amend XIV in the state courts. This court, therefore, had the jurisdiction to issue the rule and compel the relator to be produced before the court.

The extent of this court's control over the prisoner is a question of power rather than of jurisdiction. See Principe v. Ault, 62 F. Supp. 279, 282 (N.D. Ohio 1945).

This means that the authority to release on bail is also a question of power rather than of jurisdiction. Ibid. We are of the opinion that when Congress extended the jurisdiction of the federal courts to issue the writ of habeas corpus to state prisoners and to "dispose of the matter as law and justice require," (28 U.S.C. par. 2243 (1952)), it authorized the same exercise of power by the courts over these state prisoners that they had always exercised. Therefore, the extent of this power must be determined.

In determining this power reference has been made to the common law. This aids the courts in determining the extent of the broad grant of power given to them by Congress.

> "By the common law, upon the return of a writ of *habeas corpus* and the production of the body of the party suing it out, the authority under which the original commitment took place is superseded. After that time, and until the case is finally disposed of, the safe-keeping of the prisoner is entirely under the control and direction of the court to which the return is made. The prisoner is detained, not under the original commitment, but under the authority of the writ of *habeas corpus*. Pending the hearing he may be bailed *de die in diem*, or be remanded to the jail whence he came, or be committed to any other suitable place of confinement under the control of the court. He may be brought before the court from time to time by its order until it is determined whether he shall be discharged or absolutely remanded." Barth v. Clise, 12 Wall. 400, 402 (U.S. 1871).

This doctrine was first recognized by the Supreme Court in In re Kaine, 14 How. *103, *134 (U.S. 1852), and re-

asserted in *Stallings v. Splain,* 253 U. S. 339, 342 (1920). It has recently been applied by a district court in *Artukovic v. Boyle,* 107 F. Supp. 11, 15 (S.D. Cal. 1952).[2]

Revised Rule of the Supreme Court of the United States No. 49, 28 U.S.C.A. (Supp. 1954) provides that pending review of a decision discharging a rule to show cause why a writ of habeas corpus should not be granted, "The prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, *or enlarged upon recognizance with surety,* as to the court in which the case is pending, or to a judge or justice thereof, may appear fitting in the circumstances of the particular case." (emphasis added.) The rule further provides that "(1) Pending review of a decision discharging a prisoner on habeas corpus, he shall be enlarged upon recognizance with surety, for his appearance to answer and abide by the judgment of the appellate proceedings . . ." It would be highly inconsistent to hold that a dictrict court *may* release an applicant on bond after refusing the writ, and *shall* release him after granting it, but *cannot* release him while the court has the merits of the proceeding under advisement.

I am persuaded that if the relator may be admitted to bail under Rule 49 *after* an adverse decision on the merits, *a fortiori* while the decision is pending. The Supreme Court has obviously recognized the existence of an inherent power in the court issuing the writ or rule to admit the relator to bail. And consequently, under the special circumstances here existing, justice requires the relators remaining eyesight be preserved if possible pending an ultimate decision as to whether he is under

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[2] Cf. In re Gannon, 27 F. 2d 362 (E.D. Pa. 1928).

a legal or illegal custody. We need not, of course, emphasize that if the relator eventually fails on the merits, he will be remanded absolutely to the custody of the appropriate state officials.

State authorities have long been highly sensitive to federal courts barging in, as it were, on their domain. See *United States v. Hendricks, supra,* at 928. It is equally true that most federal judges, having more than sufficient work to do, would be extremely happy if they could be relieved of this unpleasant jurisdiction which Congress has thrust upon them. But having been given the duty and being reminded of its beneficient utility,[3] it is our intention to perform this duty to the best of our understanding.

CONCLUSIONS OF LAW

1. A federal district court has power to release a state prisoner on bail pending adjudication of a habeas corpus proceeding.

2. The relator, Alfred J. Ackerman, should be released on bail in the sum of Ten Thousand ($10,000) Dollars, pending determination of the rule to show cause why the writ of habeas corpus should not issue.

Appropriate orders have been entered.

(signed) RABE F. MARSH
United States District Judge

Dated August 15, 1955

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[3] Two recent cases in which the writ has been granted in Pennsylvania are: United States ex rel. Thompson v. Dye, 221 F. 2d 763 (3d Cir. 1955): a murderer sentenced to death in Allegheny County; United States ex rel. Almeida vs. Baldi, 195 F. 2d 815 (3d Cir. 1952), cert. denied 345 U. S. 904 (1953): a murderer sentenced to death in Philadelphia.

Opinion of the Court of Appeals.

(Filed August 7, 1956)

PER CURIAM:

The record demonstrates that the relator-appellant, Ackerman, has failed to exhaust his State remedies on the issue of denial of due process by reason of widespread pre-trial publicity which is alleged to have created an atmosphere of hysteria and prejudice. It is conceded by Ackerman that the issue of such pervasive and unfavorable publicity was not submitted to the Superior Court of Pennsylvania. See Rule 28. It is further conceded that that issue was not even referred to in the petition for leave to appeal to the Supreme Court of Pennsylvania. Careful consideration has been given to the arguments raised by appellant under II and IV of his brief.

Accordingly, the judgment of the court below will be affirmed.

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NOV 10
JOHN T. FEY,

Supreme Court of the United States

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NO. 514

UNITED STATES OF AMERICA, ex rel.
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v.

FRANK C. JOHNSTON, Warden, Western State
Penitentiary, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE UNITED STATES FOR THE THIRD CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1956

NO. 514

UNITED STATES OF AMERICA, ex rel.
ALFRED J. ACKERMAN, Petitioner

v.

FRANK C. JOHNSTON, Warden, Western State Penitentiary, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE UNITED STATES FOR THE THIRD CIRCUIT

COUNTER-STATEMENT OF QUESTIONS FOR REVIEW

1. Does consolidation for trial of indictments for similar and connected offenses constitute a denial of due process?

2. In habeas corpus petitions of state prisoners, should federal courts consider issues as to which petitioner has not exhausted state remedies?

COUNTER-STATEMENT OF THE CASE

The petitioner, Alfred J. Ackerman, was tried on a total of eighty indictments. Of this group, thirty were charges of false pretense, eight were charges of extortion, forty were charges of misdemeanor in office, one was a charge of conspiracy and one was a charge of violation of the Motor Vehicle Code. The charges in

these cases arose out of alleged misconduct of the petitioner in the operation of his office as Justice of the Peace in the Borough of Whitaker, Allegheny County, during a period of approximately one and a half years. The investigation by the District Attorney related to only two hundred cases handled by the petitioner though 6,600 cases were handled by him during the period of one and a half years investigated.

After the investigation was completed and informations were made, the matters were presented to the March, 1953 Grand Jury. At that time, original counsel for the petitioner had agreed to the consolidation of similar charges into a single indictment. Thus, there were five indictments returned by the March, 1953 Grand Jury: one for false pretense containing thirty counts; one for extortion containing eight counts; one for misdemeanor in office containing forty counts; one for conspiracy with J. B. Bolden, the co-defendant in the trial; and one for violation of the Motor Vehicle Code. When an objection to the return in this manner was raised on behalf of the petitioner, the matters were resubmitted to the May, 1953 Grand Jury which returned the indictments upon which the petitioner was tried. It should be noted that all of the substantive offenses charged are misdemeanors except for false pretense, which was changed from a misdemeanor to a felony by the Act of May 21, 1943, P.L. 306, Section 1 (18 P.S. 4836).

The jury was selected after a *voir dire* examination as requested by counsel for the petitioner, which request was not objected to by the Commonwealth. In fact, the arrangements for such examination had been made prior to the request of petitioner's counsel. Further, at the request of the Commonwealth, the jury was seques-

tered and it was explained to counsel for Ackerman, who was evidently unaware of the import and effect of sequestration of jurors, that the sequestration would mean that the jurors would not have access to newspapers, radio or other media of news dissemination.

Counsel agreed to a method of presentation of evidence and direct and cross-examination of the petitioner so that each series of cases was denominated as File No. 1, etc., and the petitioner answered the charge of each such file and was cross-examined on each such file. Thus, neither the prosecution nor the defense jumped from one factual issue to another in the course of examination. The proofs offered by the prosecution consisted of photostatic copies of the transcript of the Controller of Allegheny County showing the date and amount of costs collected from the county in each case by petitioner and testimony from witnesses that they had also paid costs on the same case or cases to petitioner; other testimony by witnesses who were involved in cases before Ackerman corroborated by petitioner's own records and notations concerning the cases. The evidence involved thirty-seven factual situations out of which had arisen the number of criminal charges for which petitioner stood trial.

The trial lasted nine days which is not an unusually long time for a case involving a public official charged with misconduct during his term of office. The jury discriminated among the cases and found the petitioner guilty on 57 indictments and not guilty on 18 indictments and the petitioner was sentenced on only nine cases for a total period of two years, sentence being suspended on the other 48 cases.

Counter-Statement of the Case.

Petitioner's conviction was reviewed by the Superior Court of Pennsylvania, the Supreme Court of Pennsylvania and the Supreme Court of the United States, certiorari denied. The petition for writ of habeas corpus in the District Court of the United States was his first collateral attack on the judgment of the state courts. The District Attorney of Allegheny County filed a Motion to Discharge the Rule and Dismiss the Writ of Habeas Corpus on which oral argument was heard. Further, an Answer to the Petition was filed by the District Attorney. Preliminarily to a hearing on the merits, petitioner's request for admission to bail pending determination of the rule to show cause why the writ of habeas corpus should not issue was considered. This request was granted. The Court of Appeals refused to grant writs of prohibition and mandamus sought on behalf of the respondent in this case.

After hearing, argument and submission of briefs on the merits of the petition for habeas corpus, the District Court discharged the writ of habeas corpus. Upon renewed application for admission to bail, petitioner was released on bail pending appeal.

The Court of Appeals of the United States for the Third Circuit sustained the decision of the District Court and subsequently denied a Petition for Rehearing. The mandate of that court was stayed pending the application of petitioner to this court.

ARGUMENT

I. Consolidation for Trial of Indictments for Similar and Connected Offenses Does Not Constitute a Denial of Due Process.

The matter of consolidation of indictments for trial has always been considered to be a matter within the discretion of the trial court. This is true in those jurisdictions which have statutes permitting consolidation as well as in Pennsylvania where the propriety of consolidation is the subject of decisional law rather than statutes: *Withers v. Commonwealth,* 5 S & R (Pa) 59 (1819); *Commonwealth v. Valotta,* 279 Pa. 84 (1924); *Commonwealth v. Danleczk,* 85 Pa. Super. 253 (1925); *Commonwealth v. McCord and Waggy,* 116 Pa. Super. 480 (1935); *Commonwealth v. Reilly,* 125 Pa. Super. 340 (1937); *Commonwealth v. Quinn,* 144 Pa. Super. 400 (1941). This proposition is true in federal courts under specific rules.

The test in Pennsylvania for consolidation of indictments has been and is whether the indictments involved similar or connected offenses. The state courts in the instant case have applied that test to the facts and sustained the consolidation as being a valid exercise of the discretion of the trial court.

The District Court entertained some misgiving as to the consolidation of the common law indictments for misdemeanor in office (App. Vol. V, pp. 1462a-1463a). The Pennsylvania courts sustained the indictments in the face of the argument of merger under Section 1104 of Act of June 24, 1939, P.L. 872 (18 P.S. 5104). As to the joinder of indictments for such offenses with "com-

panion" indictments without merger, the Superior Court in *Commonwealth v. Falls and Sykes,* 107 Pa. Super. 129 (1932) said at page 134:

> "True, the indictment for malfeasance in office was based on charges of extortion, bribery and violation of the liquor laws. The essence of that offense is a breach of official duty. If the misconduct happens to consist of the commission of other misdemeanors, there is no merger. An offender cannot escape punishment for the other offenses; they are independent crimes — the same as an agreement to commit a misdemeanor is a conspiracy. But, as we have seen, that offense is exclusive of the acts that follow; the latter is but evidence of the former."

In the instant case the misdemeanor in office cases were in the circle of conduct circumscribed by the petitioner's plan and scheme to cheat and defraud. Thus, the basic principles of consolidation set forth above are applicable.

Petitioner raises as a part of his argument the matter of his physical condition which was not before the District Court or the Court of Appeals in the consideration of the merits of his claim of denial of due process. It should be noted that the question of admission to bail, to which petitioner's physical condition pertained, was at all times completely divorced from the merits of the habeas corpus petition. The objections to the ruling of the District Court were limited to questions of jurisdiction and power. To inject this collateral issue, which has no relation to the due process question framed is improper. We urge that it not be considered.

Petitioner has consistently argued that the position of this Court as expressed in *U. S. v. Ashe,* 270 U.S. 424 (1926) is no longer the position of this Court in questions involving state procedure. Pertinent to this argument is the language of this Court in *Gryger v. Burke,* 334 U.S. 728, 730 (1948):

> "* * * And it in any event is for the Pennsylvania Courts to say under its law what discretion the court may have had. Nothing in the record impeaches the fairness and temperateness with which the trial judge approached his task. His action has been affirmed by the highest court of the Commonwealth. We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."

We submit that the principles of that case are applicable here.

II. The Refusal of the District Court and the Court of Appeals to Consider Questions as to Which Petitioner Had Not Exhausted His State Remedies Was Proper.

Under the decision of *Brown v. Allen,* 344 U.S. 443, it was established that a state prisoner need not "ask the state for collateral relief, based on the *same evidence and issues* already decided by direct review with another petition for certiorari directed to this court." (Emphasis added) *Brown v. Allen, supra,* 447. The effect of this decision was to make it easier for a state prisoner to present his complaints of confinement in alleged violation of the United States Constitution to the federal courts. It, however, restricts the matters which may be considered by the federal courts to those urged before and passed upon by the state courts. Thus, in *Vanderwyde v. Denno,* 113 F. Supp. 918, affirmed 210 F2d 105, cert. denied 347 U.S. 949, the court said:

> "Although petitioner urges several grounds as a basis for his application for a writ of habeas corpus only those grounds urged before and passed on by the state courts can be considered here. *Brown v. Allen, supra,* 28 U.S.C. Sec. 2254."

The position of the District Court and the Court of Appeals as to this issue is in accord with the principles of *Brown v. Allen, supra,* and is sound. The attack by the petitioner on such a position is, at best, a maneuver born of desperation and entitled to little consideration.

CONCLUSION

This Court has historically considered that only cases of gravity or importance should be the subject of the exercise of its jurisdiction to review a case on certiorari. It is submitted that the petition in this case raises no question of denial of due process as would necessitate this Court's review. Accordingly, we respectfully request that the prayer of the petitioner be denied.

Respectfully submitted,

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